Douglas Emmett Management, LLC *and* International Union of Operating Engineers, Local 501, AFL–CIO. Cases 31–CA–206052 and 31–CA–211448

February 23, 2021

DECISION AND ORDER

BY CHAIRMAN MCFERRAN AND MEMBERS KAPLAN AND EMANUEL

On August 27, 2019, Administrative Law Judge Jeffrey D. Wedekind issued the attached decision. The General Counsel and the Union filed exceptions and supporting briefs, the Respondent filed an answering brief, and the Union filed a reply.

The National Labor Relations Board has delegated its authority in this proceeding to a three-member panel.

The Board has considered the decision and the record in light of the exceptions and briefs and has decided to affirm the judge's rulings, findings, and conclusions[1] and to adopt the recommended Order as modified.[2]

The Board has considered the decision and the record in light of the exceptions and briefs and has decided to affirm the judge's rulings, findings, and conclusions and to adopt the recommended Order.

ORDER

The National Labor Relations Board adopts the recommended Order of the administrative law judge as modified below and orders that the Respondent, Douglas Emmett

[1] In the absence of exceptions, we adopt the judge's findings that prior to the election the Respondent violated Sec. 8(a)(1) by: (1) Regional Engineer Don Hermanson's interrogation of employee Fernando Salazar about whether he heard or talked to any employee about the Union; (2) solicitations of grievances by Director of Engineering Robert Lutes, Labor Manager Simon Jara, and Hermanson with an implied or express promises to remedy them during a series of mandatory employee meetings; (3) President and CEO Jordan Kaplan's statement of futility that the Respondent would never sign a standard area union contract or any union contract that provided better or more benefits than the Respondent currently provided to its employees; (4) Lutes' threat that the Respondent would fire everyone the moment they engaged in a strike; and (5) Hermanson's threatening employee Juan Avila on the day of the election with loss of pay or other unspecified reprisals by repeatedly stating, "I make payroll," if Avila voted for the Union. Also in the absence of exceptions, we adopt the judge's dismissal of the allegations that, prior to the election, Lutes violated Sec. 8(a)(1) by threatening employees that the Respondent would not sign the standard area union contract and that Kaplan unlawfully told employees he "would do anything and everything he could to stop the Union from getting in within the bounds of the law."

We find no merit in the Union's exception to the judge's dismissal of the single postelection 8(a)(1) allegation that Lutes implied during employees' performance reviews that the Respondent implemented lower annual wage increases and bonuses because employees selected representation by the Union. Rather, we agree with the judge that Lutes' comments were "essentially accurate" statements regarding the parties' continued bargaining over wages and bonuses, as part of the Respondent's desire to include these subjects in an overall economic package.

The Board also adopts the judge's dismissal of the postelection 8(a)(3) allegation that the Respondent offered and implemented lower annual wage increases and bonus amounts for discriminatory reasons, however, based on different rationales. Members Kaplan and Emanuel note that the General Counsel conceded that the Respondent met its good-faith bargaining obligation by giving adequate notice of its intent to offer reduced wages and bonus amounts (due to the impending bargaining). In their view, it would be logically inconsistent for the Board to both accept that the Respondent met its good-faith bargaining obligation, and simultaneously find that the Respondent's implementation of the lawfully announced changes was discriminatorily motivated. Additionally, although the judge did not reference *Wright Line*, 251 NLRB 1083 (1980), enfd. 662 F.2d 899 (1st Cir. 1981), cert. denied 455 U.S. 989 (1982), approved in *NLRB v. Transportation Management Corp.*, 462 U.S. 393 (1983), Members Kaplan and Emanuel would reach the same result under a *Wright Line* analysis. Thus, they agree with Chairman McFerran's ultimate conclusion that the Respondent would have offered and implemented the reduced wages/bonuses in any event, consistent with its stated bargaining strategy, as explained below.

Although Chairman McFerran joins her colleagues in affirming the dismissal of the 8(a)(3) discrimination allegation, she does so because the Respondent has met its rebuttal burden under *Wright Line*, supra. Chairman McFerran observes that the judge, correctly, did not find that the 8(a)(3) allegation had to be dismissed solely because the Respondent apparently had met its bargaining obligation under Sec. 8(a)(5); there was no 8(a)(5) allegation in the complaint. Further, the statutory duty to bargain and the statutory duty not to discriminate are distinct and independent obligations under the Act. Moreover, Board precedent illustrates that these two types of allegations, even when involving the same underlying employer conduct, such as the case here, are separately analyzed and may be found independent of one another. See, e.g., *Phillips 66*, 369 NLRB No. 13, slip op. 6 &13 (2020) (Board separately analyzed and found that respondent did not bargain in bad faith in violation of Sec. 8(a)(5) and did not violate Sec. 8(a)(3) when it implemented its final offer), and *Reebie Storage & Moving Co.*, 313 NLRB 510, 518 fn. 10 (1993) enf. denied on other grounds 44 F.3d 605 (7th Cir. 1995) (Board found that while employer did not violate Sec. 8(a)(5) by failing to apply collective-bargaining agreement to all eligible unit members but only to union members, "identical" conduct violated Sec. 8(a)(3) based on respondent's unlawful discrimination of providing greater remuneration and superior benefits to union employees than to nonunion employees).

Accordingly, the 8(a)(3) allegation is appropriately analyzed under *Wright Line*, above, and, Chairman McFerran understands the judge's ultimate conclusion as being consistent with that framework. Thus, although Chairman McFerran finds that the General Counsel carried his initial burden of showing that the Respondent's offer and implementation of lower annual wage increases and bonuses was motivated at least in part by the employees' selection of representation by the Union, she further finds that the Respondent met its rebuttal burden by establishing that it would have offered and implemented the lower amounts in any event as part of its approach to bargaining an initial agreement with the Union. To that point, as found by the judge, the record establishes that the Respondent offered to bargain the initial wage and bonus amounts with the Union, while repeatedly stating that these amounts were designed to ensure that employees timely received at least some annual increase and bonus as the parties continued bargaining over wages and bonuses as part of an overall economic package. Indeed, Director of Engineering Lutes expressly told several employees during their performance review meetings that the wage increase and bonus amounts might change as the parties continued bargaining. In those circumstances, Chairman McFerran agrees with the judge's conclusion that the Respondent's actions were not unlawful under Sec. 8(a)(3).

[2] We have modified the judge's recommended Order in accordance with our recent decision in *Danbury Ambulance Service, Inc.*, 369 NLRB No. 68 (2020).

Management, LLC, Woodland Hills, California, its officers, agents, successors, and assigns, shall take the action set forth in the Order as modified.

1. Substitute the following for paragraph 2(a).

"2(a) Post at its facilities in Woodland Hills, California copies of the attached notice marked "Appendix."[3] Copies of the notice, on forms provided by the Regional Director for Region 31, after being signed by the Respondent's authorized representative, shall be posted by the Respondent and maintained for 60 consecutive days in conspicuous places, including all places where notices to employees are customarily posted. In addition to physical posting of paper notices, notices shall be distributed electronically, such as by email, posting on an intranet or an internet site, and/or other electronic means, if the Respondent customarily communicates with its employees by such means. The Respondent shall take reasonable steps to ensure that the notices are not altered, defaced, or covered by any other material. If the Respondent has gone out of business or closed the facility involved in these proceedings, the Respondent shall duplicate and mail, at its own expense, a copy of the notice to all current employees and former employees employed by the Respondent at any time since June 1, 2017."

Dated, Washington, D.C. February 23, 2021

_____
Lauren McFerran, Chairman

_____
Marvin E. Kaplan, Member

_____
William J. Emanuel, Member

(SEAL) NATIONAL LABOR RELATIONS BOARD

Yerrik Moy, Nayla Wren, and *Jake Yocham, Esqs.,* for the General Counsel.
David A. Adlong and *Harrison C. Kuntz, Esqs. (Ogletree Deakins),* for the Respondent Company.
Adam Stern, Esq. (The Myers Law Group), for the Charging Party Union.

DECISION

JEFFREY D. WEDEKIND, Administrative Law Judge. In early 2017, Operating Engineers Local 501 began an organizing campaign to represent the approximately 20 engineers employed at eight commercial buildings owned and maintained by Douglas Emmett Management in Woodland Hills, California. Several months later, on July 28, the Union filed a petition for an NLRB-conducted representation election. Over the next 4 weeks, several company managers and a hired antiunion consultant conducted a series of mandatory large, small, and one-on-one meetings with the engineers to persuade them to vote against the Union. Nevertheless, a majority voted for the Union at the August 25 election and it was certified as the collective-bargaining representative on September 5. The Company and the Union began negotiating over an initial contract the following month, in late October 2017. However, they did not reach an agreement by the end of the year (or thereafter).

The complaint alleges that the company managers and consultant interrogated or made various other coercive statements or threats to the engineers during the organizing campaign and preelection period in violation of Section 8(a)(1) of the National Labor Relations Act. It further alleges that a few months after the Union's certification, in December 2017, the Company carried out the unlawful threats by giving the engineers substantially lower annual wage increases and bonuses than had been awarded in previous years. The General Counsel concedes that the Company complied with its obligations under Section 8(a)(5) of the Act by providing the Union with notice and an opportunity to bargain over the wage-increase and bonus amounts before implementing them at the end of the year. However, the General Counsel alleges that the Company's implementation of the lower amounts was nevertheless unlawful under Section 8(a)(3) of the Act because the Company did so to retaliate against the engineers for voting in favor of the Union in the election.

The Company disputes all of the 8(a)(1) and 8(a)(3) allegations. It contends that the evidence fails to establish that the alleged 8(a)(1) preelection statements were actually made orthat they were unlawful under the Act and Board precedent. As for the 2017 annual wage increases and bonuses, the Company contends that the evidence fails to establish that it had a past practice of granting higher wage increases and bonuses or that it harbored union animus or had a retaliatory or discriminatory motive in implementing the 2017 amounts. Further, the Company argues that the General Counsel's concession that it complied with its bargaining obligations under Section 8(a)(5) of the Act before implementing the raises and bonuses precludes a finding that their implementation violated Section 8(a)(3) of the Act.[1]

The hearing was held on April 23–26, 2019 in Los Angeles.[2]

[3] If the facilities involved in these proceedings are open and staffed by a substantial complement of employees, the notices must be posted within 14 days after service by the Region. If the facilities involved in these proceedings is closed due to the Coronavirus Disease 2019 (COVID-19) pandemic, the notices must be posted within 14 days after the facilities reopen and a substantial complement of employees have returned to work, and the notices may not be posted until a substantial complement of employees have returned to work. Any delay in the physical posting of paper notices also applies to the electronic distribution of the notice if the Respondent customarily communicates with its employees by electronic means. If this Order is enforced by a judgment of a United States court of appeals, the words in the notice reading "Posted by Order of the National Labor Relations Board" shall read "Posted Pursuant to a Judgment of the United States Court of Appeals Enforcing an Order of the National Labor Relations Board."

[1] The Company does not contest, and the admitted facts establish, that the Board has jurisdiction.

[2] The Union filed the charges and amended charges on various dates between September 8, 2017, and February 26, 2018. The NLRB Regional Office issued the consolidated complaint on April 30, 2018, and the Company filed its answer on May 14, 2018. Although the hearing was originally scheduled for July 10, 2018, the Regional Director postponed the hearing indefinitely to investigate a new unfair labor practice charge filed by the Company against the Union (31–CB–222459). That

The General Counsel and the Company subsequently filed initial briefs on May 31 and reply briefs on July 29.[3] As discussed below, the evidence and the law support most of the alleged preelection violations but not the alleged postcertfication violations.[4]

I. ALLEGED PREELECTION VIOLATIONS

The complaint alleges that the following admitted supervisors or agents committed preelection unfair labor practices in violation of Section 8(a)(1) of the Act: President/Chief Executive Officer Jordan Kaplan, Chief Operating Officer Ken Panzer, Director of Engineering Robert Lutes, Regional Engineer Don Hermanson, and Labor Consultant Simon Jara. Specifically, the complaint alleges that one or more of these supervisors or agents unlawfully interrogated employees about their union activities, solicited their grievances, promised them better terms and conditions of employment if they rejected the Union, threatened them with discharge or other reprisals if they supported the Union, and told them that supporting the Union would be futile as the Company would never negotiate or sign a contract with the Union or provide certain benefits.

A. Alleged Interrogation (Hermanson)

In June 2017, several months after the union campaign began but before the election petition was filed, Regional Engineer Hermanson approached Fernando Salazar, an engineer at one of the buildings (Trillium), and asked if he had heard or talked to any member of the Union. Salazar replied that he had not, and the conversation ended.[5]

The Board applies a "totality of the circumstances" test in evaluating alleged interrogations; that is, the Board examines all the circumstances to determine if the questioning would have reasonably tended to restrain or coerce an employee in the exercise of union activity. See *Rossmore House*, 269 NLRB 1176, 1178 (1984), affd. sub. nom. *Hotel & Restaurant Employees Local 11 v. NLRB*, 760 F.2d 1006 (9th Cir. 1985). Relevant factors include the identity of the questioner, the nature of the relationship between the questioner and the employee, the place and method of the questioning, the nature of the information sought and whether it would reveal previously undisclosed union sympathies or activities, whether the questioner offered any legitimate explanation for the question or assurance against reprisal, and whether there is a history of employer hostility to union activity,. See id. at 1178 and n. 20; Shamrock Foods Co., 366 NLRB No. 117, slip op. at 16–17 (2018), enfd. — Fed. Appx. —, 2019 WL 3229142 (D.C. Cir. July 12, 2019); and Intertape Polymer Corp., 360 NLRB 957, 957–958 (2014), enfd in relevant part 801 F.3d 224 (4th Cir. 2015), and cases cited there. See also Novato Healthcare Center v. NLRB, 916 F.3d 1095, 1106 (D.C. Cir. 2019).[6]

As indicated by the General Counsel, Hermanson's questioning of Salazar would have reasonably had a chilling effect on union activity under the circumstances. Hermanson was the regional engineer responsible for all eight of the Woodland Hills buildings and had direct supervisory authority over Salazar.[7] Further, although Salazar is a current union member, there is no evidence that he was an open union supporter at the time (indeed, Hermanson's question would make little sense if he was) and Salazar testified that he had never spoken with Hermanson about the Union before. Moreover, the question sought information about Salazar's union-related activity—whether he had talked to any union member. And the question was not asked during a casual encounter or conversation; Hermanson approached Salazar outside the building for the sole purpose of asking him about the Union and offered no legitimate explanation for doing so or assurance against reprisal. Finally, although the Company had not yet begun its antiunion campaign at the time, it did so several weeks later and, as discussed below, the antiunion campaign included unlawful threats of retaliation for supporting the Union.[8] Accordingly, Hermanson's questioning of Salazar violated Section 8(a)(1) of the Act as alleged. Cf. *Park N Fly, Inc*., 349 NLRB 132, 133 (2007).[9]

B. Alleged Solicitation of Grievances (Lutes, Jara, and Hermanson)

On July 31, the Monday after the union election petition was filed, Director of Engineering Lutes held a series of mandatory meetings with the engineers to address the petition. He met with five to seven engineers at a time in one of the building conference rooms. At each of the meetings, he introduced Labor Consultant Jara and said the Company had retained him to help them respond to the union campaign. He then gave a speech to them from a prepared script. He said that the Company had obviously screwed up in some ways; that those who signed union cards had done so for a reason and must be very upset with the Company; and that the Company didn't want to guess what was wrong. He

charge was dismissed by the Regional Director on September 26, 2018, and the General Counsel denied the Company's appeal on December 27, 2018.

[3] By order dated July 18, 2019, I granted the parties leave to file reply briefs. See also Tr. 586. As noted in that order, in the absence of objection p. 606, L.19 of the transcript is corrected to read, "It's not offered for the truth of the matter."

[4] Citations to the record are included to aid review and are not necessarily exclusive or exhaustive. In making credibility findings, all relevant factors have been considered, including the interests and demeanor of the witnesses; whether their testimony is corroborated or consistent with the documentary evidence and/or the established or admitted facts; inherent probabilities; and reasonable inferences that may be drawn from the record as a whole. See, e.g., *Daikichi Corp*., 335 NLRB 622, 623 (2001), enfd. 56 Fed.Appx. 516 (D.C. Cir. 2003); and *New Breed Leasing Corp. v. NLRB,* 111 F.3d 1460, 1465 (9th Cir.), cert. denied 522 U.S. 948 (1997). Consideration has also been given to the passage of time since the relevant events and the likelihood that the employees would have imperfect memories regarding the multiple meetings they had with multiple company supervisors or agents during the August 2017 preelection period.

[5] See Salazar's uncontroverted testimony, Tr. 278–279. Hermanson retired in early 2019 and did not testify.

[6] The Board also considers the truthfulness of the employee's reply to the employer's question. Here, however, the record is unclear whether Salazar truthfully or falsely denied speaking to any union member.

[7] Jt. Exh. 1; Tr. 105–106, 111, 132, 211, 277–278, 297–298, 312, 323, 350–351.

[8] See *Westwood Health Care Center*, 330 NLRB 935, 940 and n. 17 (2000) ("[A] question that might seem innocuous in its immediate context may, in the light of later events, acquire a more ominous tone. . . . An employee may reasonably come to realize only after the fact, in light of subsequent statements or events, that seemingly benign questions were actually efforts to ferret out his union sentiments by an employer hostile to union activity.")

[9] Although the complaint alleges that Hermanson interrogated "employees," the General Counsel only presented evidence that Hermanson interrogated Salazar. The complaint also alleges that Labor Consultant Jara interrogated employees, but the General Counsel withdrew that allegation. See GC Exhs. 1(v) and 2.

said the Company was therefore having the meetings to listen to them, so they could tell the Company anything they want. He cautioned, however, that the Company was legally prohibited from promising to fix things. He then gave the engineers time to respond.[10] And at least some of them voiced various complaints, including inadequate pay, medical benefits, and training, and lack of respect. Lutes thanked them for "opening up" and "sharing" the information, stating that it had been "invaluable." He repeated that he could not legally make promises "right now," but said "we heard you loud and clear" and that "we will respond the next time we meet as best we can."[11]

Shortly thereafter, Jara also began holding separate mandatory meetings with the engineers in the building conference rooms. The meetings varied in size; typically they were with two to six engineers at a time, but sometimes with just one. Lutes also attended and spoke at some of the meetings. Jara told the engineers that he was meeting with them to "follow up" and learn more about their complaints or concerns. He said they should feel free to talk, as anything they told him would go straight to the "big guys at the top" or "top guys." The engineers told Jara basically what they told Lutes; that they wanted better pay and medical benefits, more training, and respect. One of them also said he was upset that the Company had demoted one of the other engineers. Jara replied that the Union just wanted their money and would not be able to deliver what it was promising them.[12]

Regional Engineer Hermanson also visited the engineers in their own offices every few days during the same period. He spoke to one or two of them at a time, depending on who was in the office. As he had occasionally in the past (approximately twice a year), he asked how they were doing and whether there was anything they needed. However, during at least some of the meetings he also mentioned or referenced the pending union election, said that the Company was trying to see if there were any changes it could make, and asked if there was anything he could do for them.[13]

Lutes also held a second series of meetings with the engineers during the last week before the August 25 election. As on July 31, he spoke from a prepared script. He told them that Jara had informed him that they were very upset and many felt let down by management. He said he was sorry for any problems he caused them. He said they had both his and the Company's attention and that he wanted them to give him "another chance." As on July 31, he said he could not legally make them any promises. However, he asked for "another opportunity to work directly" with them. He said he wanted to "make sure each and every one of you is happy," and that he was "committed to making this a great place to work."[14]

An employer's solicitation of employee grievances during a union campaign inherently includes an implied promise to remedy them and is therefore unlawful unless the employer has a past policy and practice of soliciting grievances and did not significantly alter its past manner and method of doing so. See, e.g., *Shamrock Foods Co.*, above, 366 NLRB No. 117, slip op. at 10, and cases cited there. Here, as indicated above, Lutes, Jara, and Hermanson all solicited the engineers' grievances during the preelection period. Moreover, all three augmented and reinforced the implicit promise to remedy those grievances with additional statements indicating that the Company would in fact do so if they did not support the Union. Cf. *St. Francis Medical Center*, 340 NLRB 1380, 1381 (2003) (manager unlawfully solicited grievances by telling a union supporter, "Apparently you have some problems" and asking, "What is it that we can do for you?"); *Majestic Star Casino, LLC*, 335 NLRB 407, 408 fn. 4 (2001) (HR director unlawfully solicited grievances by asking employees about their problems and concerns and, after they told her what they were, telling them that she would "look into these things"); *Coronet Foods, Inc.*, 305 NLRB 79, 85 (1991) (vice-president unlawfully solicited grievances by asking employees what their three wishes would be and telling them he would present them to the owner); and *Fisher-Haynes Corp. of Georgia*, 262 NLRB 1274, 1275 (1982) (plant manager unlawfully solicited grievances by telling employees that "if they gave him a chance, he would straighten it out . . . [that they] would all be made happy."). See also *Evergreen America Corp*., 348 NLRB 178, 217 (2006), enfd. 531 F.3d 321 (4th Cir. 2008). Further, there is no evidence that the Company had a past policy or practice of soliciting the engineers' complaints in the same manner.[15]

The Company nevertheless argues that no violation occurred because Lutes repeatedly stated during his meetings with the engineers that he or the Company could not legally make any promises during the preelection period. However, such statements are sufficient to negate an implied promise to remedy grievances only in the absence of other inconsistent statements or conduct. *George L. Mee Hospital*, 348 NLRB 327, 329 (2006), citing *Uarco, Inc*., 216 NLRB 1 (1974). As discussed above, notwithstanding his statements that he could not legally make any promises, Lutes indicated by various other statements that he and the Company would, in fact, look into and respond to their complaints in a positive way. Cf. *Wake Electric Membership Corp*., 338 NLRB 298, 306–307 (2002) (manager's statement that he was not making any promises "was mere verbiage, in light of his request that the employees give the Company 'another chance,'

[10] Lutes' script specifically noted at this point that he should "get your flip chart or white board ready to write down the issues and hopefully employees will start talking . . . Be patient and accept the uncomfortable silence" (R. Exh. 6).

[11] See R. Exh. 6; and Tr. 96–98 (John Hall), 214–216, 255 (Juan Avina), 280–282 (Salazar), 329–332 (Alejandro Montenegro), 410 – 411, 428, 467, 471 (Lutes).

[12] See Tr. 98–101, 118–122 (Hall), 146, 152–156, 185–186 (Jose Antonio), 216, 222–226, 258, 272–274 (Avina), 284–287 (Salazar), 299–305, 314–315 (Douglas Vaught), and 477, 481 (Lutes). (Jara is apparently no longer a labor consultant for the Company and did not testify.) Antonio testified that Jara also said that "a lot of good changes" would be coming to them if they voted no in the election. However, this testimony was not corroborated by Montenegro, who worked in the same building with him, or any of the other engineers who were at the same or other meetings with Jara. Thus, given the passage of time since the alleged events, Antonio's testimony was likely his subjective interpretation of what Jara said rather than what he actually said. Accordingly, it has not been credited. See fn. 4, above.

[13] See Tr. 146–150 (Antonio), 226–229 (Avina), and 325–329 (Montenegro). Antonio testified that Hermanson also said that "good changes" could come for all of them if they voted no in the election. However, this testimony has not been credited for essentially the same reasons noted above.

[14] See R. Exh. 7 (the script); and Tr. 146, 157–160, 186–188 (Antonio), 217–221, 256–257 (Avina), 290–291 (Salazar), 329 –332 (Montenegro), 427–428, 485 (Lutes). Antonio testified that Lutes also said that "good changes" would be coming for all of them if they voted no in the election. However, again, this testimony has not been credited for essentially the same reasons noted above.

[15] Indeed, the record indicates that Lutes had never held such meetings with the engineers before. See Tr. 161 (Antonio), 221 (Avina), 290–291 (Salazar), and 334 (Montenegro).

and averment that the Company would 'work with' the employees"); and *Noah's New York Bagels, Inc*., 324 NLRB 266, 270–271 (1997) (president unlawfully solicited grievances by asking a prounion employee what her problems were with the company and saying he would think about them and do his best to try and solve them, notwithstanding that he also said he couldn't make any promises). So did Jara and Hermanson in their separate meetings with the engineers during the same period. And there is no evidence that they said no promises could be made, legally or otherwise. Accordingly, the Company violated Section 8(a)(1) of the Act as alleged.

C. Alleged Statements of Futility (Lutes and Kaplan)

As indicated above, Lutes sometimes attended the follow-up meetings Jara held with engineers during the preelection period. Two of those meetings, in early and mid-August, were with just one of the engineers, Douglas Vaught, who works the 3 pm–midnight shift at the Trillium building. Vaught was a longtime union member and had told the Company so when he was interviewed and hired in 2015. At both meetings, Jara and Lutes began by making various disparaging comments about the Union. Vaught disputed their comments based on his own personal experience and knowledge of the Union. Indeed, at the second meeting, he said that the Union could actually benefit the Company. This was apparently too much for Lutes, who responded that the engineers were "stupid" and needed to get the Union "out of [their] mind." Lutes said that he was going to be the negotiator for the Company and that he wasn't going to sign the Union contract. He said the Company could not afford to pay the union rates; that the only option they would have would be to go on strike; and that the moment they did so he would fire everyone.[16]

The General Counsel alleges that Lutes's statement that he wouldn't sign the Union contract constituted an unlawful statement of futility. However, it is clear from the record as a whole that Lutes was not saying that he would refuse to sign any contract with the Union, but only that he would not sign the BOMA (Building Owners and Management Association) standard area union contract, and that Vaught knew this.[17] Further, as indicated above, he explained that the Company would not do so because it could not afford the union rates. Accordingly, the statement was not an unlawful statement of futility. See *Pilot Freight Carriers*, 223 NLRB 286, 293 (1978).[18]

The following week, a day or two before the election, President/CEO Kaplan also held mandatory antiunion group meetings with the engineers. Like Lutes at his prior mandatory group meetings, Kaplan used a prepared script. He talked about the history of the Company and how well it had treated its employees during the recession. He asked the engineers to give him and the Company another chance. He also told them that if they voted for the Union the Company would bargain with it in good faith but would never agree to anything that was not in its best interests.

However, as the meetings wore on Kaplan departed from the script and spoke extemporaneously. He became angry, raised his voice, and pounded the podium or table with his fist. He told the engineers that there had never been a union in the Company and he would do anything and everything he could to the fullest extent of the law to stop the Union from getting in. He also told them that if they voted for the Union in the election, he would never agree to or sign the BOMA contract or any union contract that provided better health or other benefits to them than what the Company provided to its nonunion employees.[19]

An employer's statement that it will never agree to provide unionized employees with better wages or benefits than its nonunion workforce constitutes an unlawful statement of futility. See *Heartland of Lansing Nursing Home*, 307 NLRB 152, 158 (1992), and cases cited there. As indicated above, this is precisely what Kaplan said. Further, unlike Lutes at his meeting with Vaught, he offered no explanation, other than the vague statement that the Company would not agree to anything that was not in its "best interests." Accordingly, his statement violated Section 8(a)(1) of the Act as alleged.

The General Counsel also alleges that Kaplan unlawfully indicated that supporting the union was futile by stating that he would do anything and everything he could to stop the Union from getting in. However, as indicated above, Kaplan stated that he would do so within the bounds of the law. Accordingly, the statement was not unlawful. See generally *Ross Stores, Inc*., 329 NLRB 573, 575 (1999).

D. Alleged Threat of Discharge (Lutes)

As indicated above, Lutes also told Vaught at the mid-August meeting that the engineers' only option would be to strike and that the moment they did so he would fire everyone. Such employer statements are unlawful because former economic strikers are entitled to reinstatement if their positions have not been filled by permanent replacements or upon departure of the replacements. See *Ingredion,* 366 NLRB No. 74, slip op. at 21 (2018), enfd. — F.3d —, 2019 WL 3242548, at *5 (D.C. Cir. July 19, 2019); *Pier Sixty, LLC*, 362 NLRB 505, 524 (2015), enfd. 855

[16] See Vaught's testimony, Tr. 299–306, 314–317. Vaught's testimony was detailed and otherwise credible on its face. It was also circumstantially or indirectly corroborated by the Union's business representative, Patrick Murphy, who confirmed that Vaught called him right after and told him about Lutes's above-described comments to him at the second meeting (Tr. 38). Further, although Lutes denied making any such statements at his own scripted meetings (Tr. 412–413, 428–429), he did not deny that he did so when Jara and he met with Vaught alone. Nor did he offer an alternative version of what he said. Moreover, he was not a particularly credible or reliable witness generally. For example, he denied that he asked the engineers to tell him what their problems were and claimed he could not recall if anyone did so at the meetings (Tr. 412, 471). See also fn. 19, below (discussing his testimony about Kaplan's subsequent meetings).

[17] See Tr. 24–25, 51–56 (Murphy), and 316–317 (Vaught).

[18] The General Counsel also alleges that Lutes unlawfully indicated at one of his July 31 group meetings that it would be futile for the engineers to vote in favor of the Union, citing Hall's testimony that Lutes said "the Company's not going to go union and they're not going to negotiate" at the meeting he attended (Tr. 98). However, no such statement appears in the script used by Lutes at the July 31 group meetings. Further, Hall's testimony was not corroborated by Salazar, who attended and testified about the same meeting, or any of the other engineers. Thus, for essentially the same reasons previously discussed regarding Antonio's testimony, Hall's testimony in this regard has not been credited.

[19] See Tr. 101–103, 119–120, 125–129 (Hall), 147, 161–166, 188–191 (Antonio), 229–234, 261–264, 270 (Avina), 287–289, 291–292 (Salazar), 431–433 (Lutes), and 499–508, 517 (Engineer Cary Johnson). To the extent the testimony of one or more of these witnesses conflicts with the above findings, it has not been credited. See fn. 4, above. For example, Lutes testified that Kaplan did not bang or pound his fist on the table at the meetings. However, every other witness, including Johnson, who was also a Company witness, testified otherwise. Similarly, Johnson testified that Kaplan did not say anything about a contract or giving certain benefits to employees, but the other witnesses, including Lutes, testified to the contrary.

F.3d 115 (2d Cir. 2017); and *Care One at Madison Ave., LLC v. NLRB*, 832 F.3d 351, 360–361 (D.C. Cir. 2016), and cases cited there. Accordingly, Lutes' statement that he would fire everyone when they went on strike violated Section 8(a)(1) of the Act as alleged.[20]

E. Alleged Threat of Unspecified Reprisals (Panzer)

On August 25, the day of the election, Hermanson called Juan Avina, an engineer in another one of the buildings (Warner Center Tower 1), and told him to come down to the lobby. When Avina arrived, Hermanson, Lutes, and Jara were there along with COO Panzer. However, Panzer immediately took Avina aside, away from the group, to speak to him privately. Panzer told Avina that the Company needed his vote, needed him to vote no. Panzer asked Avina to give the Company another opportunity and reminded him, "I make payroll." Avina said, "I know you do," and tried to step away. But Panzer followed him and repeated several more times that he made payroll and really needed his vote. Avina eventually responded that he considered himself lucky to be working for the Company and appreciated what it had done for him, and the conversation ended.[21]

The Company argues that Panzer's repeated "I make payroll" statements were ambiguous and therefore lawful. See Br. at 37 ("Ambiguity dooms the General Counsel's allegation because the lack of clarity precludes it from overcoming the burden of proof."). However, as indicated by the General Counsel, a threat need not be explicit to be unlawful. The test is whether, considering all the circumstances, it would reasonably be construed by an employee as a threat of adverse consequences for supporting the union. See *Con-Way Freight*, 366 NLRB No. 183, slip op. at 5–6, and 21 (2018); and *NLRB v. Ayer Lar Sanitarium*, 436 F.2d 45, 49 (9th Cir. 1970), and cases cited there. Here, Panzer did not make repeated references to his authority over the employee payroll during a conversation about his job responsibilities. Rather, he did so while trying to persuade Avina to vote against the Union in the election. In this context, Avina would not have reasonably construed Panzer's statements as mere vague or innocuous comments about his authority over the payroll, but as veiled or implied threats of reduced pay or other adverse employment consequences if he didn't vote the way Panzer and the Company wanted him to in the union election. Accordingly, the statement violated Section 8(a)(1) of the Act as alleged.

II. ALLEGED POSTCERTIFICATION VIOLATIONS

As previously discussed, notwithstanding the Company's antiunion campaign, the Union won the August 25 election and was certified by the Board as the engineers' bargaining representative on September 5, 2017. The parties began bargaining for their first contract the following month. Lutes and Attorney David Adlong represented the Company; Business Representative Patrick Murphy and Organizing Director Jose Soto represented the Union.

Both the Company and the Union initially focused on noneconomic items and proposals.[22] The Company, however, had a practice of granting the engineers merit wage increases and bonuses at the end of each year. The amounts of each varied depending primarily on an engineer's performance during the year. If an engineer received an overall rating of at least 3 ("meets requirements") out of 5 on his evaluation—which almost everyone did in each of the four years prior to 2017—he would typically be given a 3 percent wage increase and a 5 percent bonus, prorated or reduced to account for periods during the year when he was not working at the facilities (e.g., where an engineer was hired in the middle of the year, took an extended leave of absence, or was transferred or promoted). In a very few instances, the percentages would be higher or lower, but 3/5 was the general standard for the wage increases and bonuses during those years.[23]

In mid-November, Adlong sent a letter to Murphy addressing the matter. Adlong stated that the Company currently planned to give each of the unit engineers a 2017 bonus of 2 percent on December 8. As for wage increases, he stated that the Company did not currently plan to implement any wage increases for the unit engineers as of January 1, 2018, but planned to bargain over them as part of an overall economic package in order to avoid piecemeal negotiations over economic issues. However, he stated that the Company was willing to discuss any topic regarding the bonuses or wages and asked the Union to advise whether it wanted to do so.[24]

In response, the Union requested historical wage information from the Company. After reviewing that information, the Union concluded that the engineers had historically received an average wage increase of 4.94 percent and that the failure to implement the same average wage increase for 2017 would be contrary to the Company's past practice and constitute a unilateral change. Murphy informed Adlong that this was the Union's position by email dated November 29. He further stated that the Union would consider such a unilateral change "to be retaliatory and a progression from previous threatening conduct made by Douglas Emmett personnel, including Chief Operating Officer Kenneth Panzer, during the Union election, as well as bad faith Company conduct immediately following our previous negotiation session." Murphy did not, however, address the Company's planned 2 percent bonus for 2017.[25]

Adlong replied by email later that evening, stating that Murphy had misread his letter. Adlong stated that the letter was an

[20] The General Counsel does not allege that Lutes's statement unlawfully indicated that a strike was inevitable. Compare *Sysco Grand Rapids, LLC*, 367 NLRB No. 111, slip op. at 18, 24 (2019); and *Heartland of Lansing Nursing Home*, 307 NLRB 152, 158 (1992) and cases cited there. Accordingly, this decision does not address that issue.

[21] See Avina's testimony, Tr. 234–237, 264–265. Avina's testimony was corroborated by Union Business Representative Murphy, who testified that Avina called and told him about what Panzer said (Tr. 35–36). Further, it was not controverted by Panzer, who was not called to testify by the Company.

[22] Tr. 39–40, 61–62 (Murphy), 396–397 (Lutes).

[23] See Jt. Exhs. 7–9, and the summary charts and analyses of the 2013–2016 data set forth in the General Counsel's posthearing briefs (which the Company's posthearing briefs fail to directly or adequately address or refute). See also the testimony of engineers Hall (Tr. 104–106, 110–111), Antonio (Tr. 173–181), Avina (Tr. 238–247, 266–268), and Vaught (Tr. 308–313). To the extent certain company witnesses such as Property Manager Dianne Walton testified to the contrary, their testimony is discredited because they lacked personal knowledge of how the Company determined the wage increases and bonuses and because their testimony is inconsistent with the weight of the evidence. Accordingly, it is unnecessary to address the General Counsel's request (Br. 68) for an adverse inference against the Company regarding its past practice because of its failure to call CEO Kaplan, COO Panzer or any other managers who have such personal knowledge.

[24] Jt. Exh. 12(a). The letter did not indicate whether the planned 2 percent bonus for 2017 would be conditioned on getting a particular performance rating.

[25] Jt. Exh. 12(b); Tr. 41, 46–47, 65–67, 83–85 (Murphy).

attempt to give the Union "notice and an opportunity to bargain" about the Company's plans in accordance with its duty to bargain. He further stated that he interpreted the Union's response as expressing a desire to discuss the wage increases immediately, rather than as part of the total economic package, and that he would consider 4.94 percent to be the Union's proposed wage increase for 2018.

Murphy responded about a week later, on December 5. He stated that Adlong had read his prior email wrong; that the Union's intention was to "protect the status quo environment" and that 4.94 percent was not the Union's proposed wage increase for 2018.[26]

Adlong replied to Murphy by email the next day, following a phone conversation. He stated that the he and Murphy "obviously have different views on what does and does not constitute the status quo." However, he said he would speak to his client and respond in 1–2 business days with further discussion regarding the proposed wage increase. He said that the Company was trying to negotiate the discrete wage increase immediately in order to allow it to go into effect on January 1, 2018.

The following week, on December 11, Adlong emailed Murphy and informed him that the Company was proposing a 1 percent wage increase. He invited Murphy to let the Company know if he had "a counter or would like to discuss," noting that the Company had to input the data by December 20 for the increase to take effect on January 1.[27]

Organizing Director Soto, who had been copied on Murphy's prior emails, responded for the Union by email the following day. He stated that "the Company's actions on compensation" represented "a unilateral change and a status quo violation" and that the Union interpreted it to be part of the Company's "retaliatory, discriminatory and disparate treatment against the bargaining unit for its decision to vote for union representation."

Adlong replied to Soto by email the next day. He denied that the Company had retaliated against the unit employees or made any inappropriate statements to them. He further stated that the Union's allegations that the Company's actions constituted unilateral changes were "simply baseless." He reminded Soto that the Union had been given notice and an opportunity to bargain about "the variable and discretionary issues of compensation," and that it had "an inbound offer to consider and respond to." He invited Soto to respond to the proposal rather than "merely send emails alleging violations of the Act."[28]

Neither Murphy nor Soto responded to this email. Accordingly, on December 21, Adlong notified Murphy by email that the Company would implement the 1-percent wage increase on January 1.

Soto replied to Adlong's December 21 email the next day. He told Adlong that the Union "continu[ed] to insist that the company's actions with regard to wages and bonuses" constituted a violation of the status quo and an illegal unilateral change and could only be interpreted as retaliatory given the Company's past conduct. He informed Adlong that the Union had therefore filed unfair labor practice charges against the Company.[29]

Nevertheless, the Company implemented both the 1 percent wage increase and the 2-percent bonus. As usual, it informed the engineers about these amounts during their December performance reviews. The reviews typically occurred in early December but were held a few weeks later this time due to the foregoing back and forth with the Union. In addition, unlike in past years, Lutes attended each of the reviews along with Hermanson and the property manager to answer any questions the engineers might have about the bonus and wage increase amounts and the collective-bargaining negotiations with the Union. Although few of the engineers asked any questions or protested the unusually low bonuses and wage increases, Lutes told those who did so that the amounts had been discussed with the Union, that the negotiations were ongoing, and that the amounts could change if everything got resolved before January.[30]

As promised, the Union subsequently filed unfair labor practice charges with the NLRB Regional Office. The charges alleged that the Company's actions constituted unilateral changes in past practice in violation of Section 8(a)(5) of the Act and were also retaliatory/discriminatory in violation of Section 8(a)(3) of the Act.[31]

Following an investigation, the Regional Director decided not to issue a complaint on the charge's 8(a)(5) allegation. Although agreeing with the Union that the Company had a past practice of awarding substantially higher merit wage increases and bonuses to the engineers, the Regional Director concluded that the Company fully satisfied its obligations under Section 8(a)(5) of the Act before implementing the lower 2017 amounts. Accordingly, the Regional Director dismissed that allegation.

However, the Regional Director found sufficient merit to the charge's 8(a)(3) discrimination allegation to issue a complaint on that allegation. As explained by the General Counsel at the hearing and in the initial posthearing brief, the theory of the complaint is that, although the Company complied with its 8(a)(5) bargaining obligations, its implementation of the lower wage increase and bonus amounts nevertheless violated Section 8(a)(3) because the evidence—including the Company's unlawful preelection statements and threats, Lutes' subsequent statements to the engineers during the December performance reviews, and the Company's failure to explain why the lower amounts were given—shows that the decision to do so was unlawfully motivated by union animus and therefore inherently destructive of the engineers' rights under the Act.[32]

As indicated by the Company, however, there are several problems with this theory. First, the General Counsel's concession that the Company did not violate Section 8(a)(5) of the Act

[26] Jt. Exh. 12(c), (d).

[27] Jt. Exh. 12(e), (f). See also Tr. 43–44, 72, 75–78, 85–86 (Murphy).

[28] Jt. Exh. 12(g), (h).

[29] Jt. Exh. 12(i), (j).

[30] See Jt. Exh. 1; and Tr. 48 (Murphy), 307 (Vaught), 338–340 (Montenegro), 353–360, 363– 365 (Interiano), 405, 409–410, 459–460, 490–492 (Lutes), 532–538 (Property Manager Monica Santiago) and 655–659, 673 (Property Manager Walton). To the extent the testimony of these or other witnesses is inconsistent with the above findings, it has not been credited. See fn. 4, above. For example, engineer Antonio testified that when he received his bonus and wage information from Lutes, he said, "That's fine. I mean, that's—that's what it is," and that Lutes then said, "You know what, Jose, I took this personal and it really hurt me," which Antonio assumed referred to the union vote (Tr. 172). However, this testimony is inconsistent with a statement Antonio gave to the NLRB Regional Office in February 2018 (see Tr. 193) and was controverted by both Lutes (Tr. 406–407) and Property Manager Santiago (Tr. 533–535).

[31] See GC Exh. 1(m), (p), and (s).

[32] See the consolidated complaint (GC Exh. 1(v)); the General Counsel's statements at the hearing (Tr. 19–21, 388–394); and the General Counsel's initial posthearing brief (pp. 64–65). The Regional Director's dismissal of the 8(a)(5) charge allegation is not reviewable by the Board or its administrative law judges. See *NLRB v. Commercial Workers Local 23*, 484 U.S. 112, 124–127 (1987).

necessarily means: (a) that the amounts of the annual raises and bonuses were discretionary rather than fixed and therefore the Company did not have an obligation to maintain the status quo by awarding the same amounts for 2017 as it had in prior years, i.e., the Company's failure to do so was not an unlawful "unilateral change" as asserted by the Union; (b) that the annual raises and bonuses were discrete recurring events and therefore the Company could lawfully modify their amounts during contract negotiations without an overall impasse provided it gave the Union reasonable notice and an opportunity to bargain over the intended modifications; and (c) that the Company did, in fact, give the Union sufficient notice and an opportunity to bargain over the 2017 amounts before implementing them. See *Covanta Energy Corp.*, 356 NLRB 706, 719–720 (2011) (summarizing Board precedent regarding an employer's legal obligations and rights with respect to such discrete recurring events that arise during contract negotiations).

Second, it is neither abnormal nor necessarily bad faith for an employer to open with a low wage and benefit offer or proposal. As stated in *American Express Reservations, Inc*., 209 NLRB 1105, 1118 (1974):

> [I]t is the nature of collective bargaining or any other bargaining and negotiating by people of experience, that, according to their respective positions, one party starts high and the other low. If a union is prepared to settle for a 20- or 25-cent increase, it may initially demand 80. The employer, although [it] may be willing to ultimately agree to 15 or 20 cents, may initially offer 5 cents. They then bargain out their differences.

See also *Merck, Sharp & Dohme Corp.,* 367 NLRB No. 122, slip op. at 4 (May 7, 2019) ("The [collective-bargaining] process, by its nature, may involve hard negotiation, posturing, brinkmanship, and horse trading over a long period of time."). And, as indicated above, the General Counsel has effectively conceded that the Company's initial proposal for a 1-percent raise and 2 percent bonus did not constitute bad-faith bargaining.[33]

Third, given the Union's failure to test the Company's good faith by making any counter-proposals, it would be speculative to conclude that the Company would not have moved off its initial proposal and increased the amounts to past levels. See *PSAV Presentation Services*, 367 NLRB No. 103, slip op. at 6 (2019) ("The Board will not find that an employer failed to bargain in good faith if the union failed to test the employer's willingness to bargain."), citing *Captain's Table*, 289 NLRB 22 (1988) (employer's conduct during contract negotiations could not be found unlawful under Section 8(a)(5) of the Act given that the union failed to test the employer's willingness to bargain by offering counterproposals and timely providing requested information before filing its unfair labor practice charge).

Fourth, under Board law, an employer is prohibited from implementing amounts substantially different from its preimpasse proposals to the union. See *FirstEnergy Generation, LLC*, 366 NLRB No. 87, slip op. at 11 (2018), enfd. in relevant part 929 F.3d 321, 329–332 (6th Cir. 2019), and cases cited there (employer's changes must be "reasonably comprehended" within its prior proposals). Thus, the Company would have violated Section 8(a)(5) of the Act if it had not implemented raises and bonuses in December 2017 that were consistent with its prior proposals to the Union.

In sum, the General Counsel's 8(a)(3) discrimination allegation regarding the 2017 wage increases and bonuses is inconsistent and legally incompatible with the General Counsel's concession that the Company complied with its 8(a)(5) bargaining obligations with respect to those wage increases and bonuses. Cf. *Voca Corp*., 329 NLRB 591, 593 (1999) (judge's finding that the employer violated Sec. 8(a)(3) of the Act by requesting the union's permission to give a corporate-wide bonus to the bargaining unit employees notwithstanding their ineligibility for such bonuses under the extant contract was "inconsistent" with his finding that the employer's request constituted a request for bargaining and was "legally incompatible" with the employer's continuing obligation under Sec. 8(a)(5) to bargain with the union pending the Board's ruling on the union's objections to the recent decertification election). Accordingly, the allegation will be dismissed.

Finally, the General Counsel also alleges that Lutes's statements to the engineers during the December 2017 performance reviews about the lower wage-increase and bonus amounts and the negotiations with the Union independently violated Section 8(a)(1) of the Act. The theory of this alleged violation is that Lutes unlawfully blamed the Union for the lower amounts. However, the cases cited by the General Counsel in support of this theory are distinguishable because they involved situations where the employer had an obligation under the Act but failed to maintain the status quo with respect to the subject terms. See *Salvation Army Williams Memorial Residence*, 293 NLRB 944, 969 (1989); *Larid Printing*, 264 NLRB 369 (1982); and *Halo Lighting Division of McGraw Edison Co*., 259 NLRB 702, 703–704 (1981). See also *Richfield Hospitality*, 368 NLRB No. 44, slip op. at 2 fn. 4, and 21 (2019); and *More Truck Lines, Inc*., 336 NLRB 772 (2001), enfd. 324 F.3d 735 (D.C. Cir. 2003). As discussed above, the General Counsel does not allege that the Company had such an obligation or violated it here with respect to the wage-increase and bonus amounts. Further, Lutes's statements were essentially accurate. Accordingly, this allegation will be dismissed as well.

CONCLUSIONS OF LAW

1. The Company committed unfair labor practices in violation of Section 8(a)(1) of the Act by:

(a) Interrogating an employee about his union activities during the union organizing campaign in June 2017.

(b) Soliciting grievances from employees and impliedly or expressly promising to remedy them during preelection antiunion meetings on July 31 and in August 2017.

(c) Threatening employees with discharge if they voted for the Union by telling an employee at a preelection antiunion meeting in mid-August 2017 that the employees' only option would be to strike and that the moment they did so it would fire them.

(d) Informing employees at antiunion meetings a day or two before the August 25, 2017 election that it would be futile to vote

[33] Lutes testified at the hearing that the Company did, in fact, propose only a 1 percent raise and 2 percent bonus because it anticipated that the Union would ask for 5–6 percent or more and the Company wanted to leave itself room to move in negotiations (Tr. 401–403). However, the foundation or basis for this testimony was never adequately established. Although Lutes was on the company bargaining team, he admitted that he has never been involved in deciding the wage increase and bonus amounts (Tr. 400, 446, 453, 493) and it is therefore unlikely he would have decided on his own how much to propose to the Union. In any event, it doesn't matter given the General Counsel's concession that the Company's proposal did not constitute bad faith bargaining.

in favor of the Union by telling them that the Company would never agree to or sign the BOMA standard area union contract or any union contract that provided better health or other benefits to them than what the Company provided to its nonunion employees.

(e) Threatening an employee on the day of the election with loss of pay or other unspecified reprisals if he voted in favor of the Union.

2. The foregoing unfair labor practices affect commerce within the meaning of Section 2(6) and (7) of the Act.

3. The Company did not otherwise violate Section 8(a)(1) and (3) of the Act as alleged in the complaint.

ORDER[34]

The Respondent, Douglas Emmett Management, LLC, Woodland Hills, California, its officers, agents, successors, and assigns, shall

1. Cease and desist from

(a) Coercively interrogating employees about their union activities or the union activities of others.

(b) Soliciting complaints or grievances from employees and impliedly or expressly promising to remedy them in order to discourage union support or activity.

(c) Informing employees that it is futile to support Operating Engineers Local 501 or any other union.

(d) Threatening employees with discharge for engaging in union activities.

(e) Threatening employees with loss of pay or other unspecified reprisals to discourage union support or activities.

(f) In any like or related manner restraining or coercing employees in the exercise of the rights guaranteed them by Section 7 of the Act.

2. Take the following affirmative action necessary to effectuate the policies of the Act.

(a) Within 14 days after service by the Region, post at its facilities in Woodland Hills, California, copies of the attached notice marked "Appendix."[35] Copies of the notice, on forms provided by the Regional Director for Region 31, after being signed by the Respondent's authorized representative, shall be posted by the Respondent and maintained for 60 consecutive days in conspicuous places including all places where notices to employees are customarily posted. In addition to physical posting of paper notices, the notices shall be distributed electronically, such as by email, posting on an intranet or an internet site, and/or other electronic means, if the Respondent customarily communicates with its employees by such means. Reasonable steps shall be taken by the Respondent to ensure that the notices are not altered, defaced, or covered by any other material. If, during the pendency of these proceedings, the Respondent has gone out of business or closed the facilities involved in these proceedings, the Respondent shall duplicate and mail, at its own expense, a copy of the notice to all current employees and former employees employed by the Respondent at those facilities at any time since June 1, 2017.

(b) Within 21 days after service by the Region, file with the Regional Director a sworn certification of a responsible official on a form provided by the Region attesting to the steps that the Respondent has taken to comply.

It is further ordered that the complaint is dismissed insofar as it alleges violations of the Act not specifically found.

Dated, Washington, D.C., August 27, 2019

APPENDIX

NOTICE TO EMPLOYEES
POSTED BY ORDER OF THE
NATIONAL LABOR RELATIONS BOARD
An Agency of the United States Government

The National Labor Relations Board has found that we violated Federal labor law and has ordered us to post and obey this notice.

FEDERAL LAW GIVES YOU THE RIGHT TO

Form, join, or assist a union

Choose representatives to bargain with us on your behalf

Act together with other employees for your benefit and protection

Choose not to engage in any of these protected activities.

WE WILL NOT coercively interrogate you about your union activities or the union activities of others.

WE WILL NOT solicit your complaints and grievances and impliedly or expressly promise to remedy them in order to discourage union support or activity.

WE WILL NOT inform you that it is futile to support Operating Engineers Local 501 or any other union.

WE WILL NOT threaten you with discharge for engaging in union activities.

WE WILL NOT threaten you with loss of pay or other unspecified reprisals to discourage union support or activities.

WE WILL NOT in any like or related manner interfere with, restrain, or coerce you in the exercise of the rights described above.

DOUGLAS EMMETT MANAGEMENT LLC

The Administrative Law Judge's decision can be found at www.nlrb.gov/case/31-CA-206052 or by using the QR code below. Alternatively, you can obtain a copy of the decision from the Executive Secretary, National Labor Relations Board, 1015 Half Street, S.E., Washington, D.C. 20570, or by calling (202) 273-1940.

[34] If no exceptions are filed as provided by Sec. 102.46 of the Board's Rules and Regulations, the findings, conclusions, and recommended Order shall, as provided in Sec. 102.48 of the Rules, be adopted by the Board and all objections to them shall be deemed waived for all purposes.

[35] If this Order is enforced by a judgment of a United States court of appeals, the words in the notice reading "Posted by Order of the National Labor Relations Board" shall read "Posted Pursuant to a Judgment of the United States Court of Appeals Enforcing an Order of the National Labor Relations Board."